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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

NO:

LESLIE LOWENFIELD,
PETITIONER

VERSUS

STATE OF LOUISIANA,
RESPONDENT

ON PETITIONER FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT

BRIEF OF THE STATE OF LOUISIANA IN OPPOSITION

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STATEMENT OF THE CASE

The United States Court of Appeals, Fifth Circuit, recited the procedural history as follows:

> "The petitioner, Leslie Lowenfield, was convicted of the first degree murder of three persons; the court sentenced him to death on each count on the jury's recommendation. The conviction and sentence was affirmed by the Louisiana Supreme Court, State v. Lowenfield, 495 S.2d 1245 (La. 1985), cert. denied, ____ U.S. ____, 106 S.Ct. 2259, 90 L.Ed.2d 704 (1986). Post conviction relief was denied by the state court. Lowenfield v. Phelps, 497 So.2d 301 (La. 1986). On Lowenfield's application for federal habeas relief, the district court stayed the execution set for November 19, 1986, so it could carefully consider the petition. Following a full evidentiary hearing, the district court denied habeas relief and vacated its earlier stay of execution; it also denied a certificate of probable cause. Lowenfield filed a notice of appeal from the district court's denial of habeas relief, and he sought a certificate of probable cause from this court."

Lowenfield v. Phelps, United States Court of Appeals, Fifth Circuit, (No. 87-3305). Petitioner now applies for writs of certiorari from the United States Court of Appeals, Fifth Circuit, which denied Petitioner's certificate of probable cause and stay of execution.

STATEMENT OF THE FACTS

The United States Court of Appeals, Fifth Circuit, found the facts to be as follows:

"Petitioner, a native of Guyana, came to Louisiana from Canada in June 1981 and met the primary victim, Sheila Thomas, a deputy sheriff in Jefferson Parish, Louisiana, shortly thereafter. Ms. Thomas, along with her young daughter, victim Shantell Osborne, moved in with Lowenfield later in the summer of 1981. Lowenfield and Ms. Thomas lived together off and on for approximately one year. During this year, Ms. Thomas left Lowenfield on three separate occasions and returned to live with her mother. Lowenfield became increasingly bitter following each separation. When Ms. Thomas returned to her mother's home for the last time, he repeatedly threatened and harassed Ms. Thomas and her mother, victim, Myrtle Griffin.

In the late afternoon of August 30, 1982, Owen Griffin, Sheila Thomas' stepfather, was in a vacant lot near his home in Marrero, Louisiana playing cards with friends. Owen Griffin hear shots ring out from his home, and ran to the house and rushed inside whereupon more shots rang out. When the police arrived, they found five bodies sprawled about the living area of the house; they found the bodies of Sheila Thomas, her four-year old daughter Shantell, Owen Griffin, his wife Myrtle Griffin, and Carl Osborne, the father of Shantell. All of the victims had sustained multiple gunshot wounds; each had been shot in the head at close range.

For a more detailed statement of the facts, see the Louisiana Supreme Court's decision in State v. Lowenfield, 495 S.2d 1245 (La. 1985), cert. denied, ____ U.S. ____, 106 S.Ct. 2259 (1986)."

Lowenfield v. Phelps, United States Court of Appeals, Fifth Circuit, (No. 87-3305).

ARGUMENT NO. 1

As his first assignment of error, Petitioner suggests that the trial judge coerced a seemingly deadlocked jury into sentencing him to death. Petitioner's assertion lacks a basis in fact or law and should be denied.

The United States Court of Appeals, Fifth Circuit, gave the following factual rendition.:

> "The jury was charged following the guilt phase of the trial on May 14, 1984 at 11:45 a.m.; they deliberated until 7:45 p.m. when the trial court recessed for the night at the jury's request. The jury resumed its deliberations the next day at 10:05 a.m., and returned with its guilty verdicts at 3:05 p.m.
>
> The sentencing hearing, according to Judge Cannella, commenced three hours later, at 6:05 p.m., and concluded at

8:17 p.m. Following the sentencing hearing, the jury deliberated until 11:55 p.m., at which time the trial court recessed for the night at the jury's request. The jury reconvened the next day, May 16, 1984, at 9:40 a.m. Two hours later defense counsel moved for a mistrial arguing that the elapsed deliberation time, five hours, and the last instruction by Judge Cannella at the guilt phase justified a mistrial. Approximately three hours later, counsel reurged their motion. While counsel were arguing their motion for mistrial, the trial judge received a note from the jury indicating that it was deadlocked. The trial court then polled the jury and asked them "do you feel that any further deliberations will enable you to arrive at a verdict?" One juror responded negatively; the balance of the jury answered the question affirmatively. The court instructed the jury to continue its deliberations and repeated parts of its earlier charge, including the statement that if they were unable to reach a verdict, the court would sentence the Petitioner to life imprisonment. Thirty minutes later the jury returned its verdict."

Lowenfield v. Phelps, No. 87-3305, slip op. at 4023 (5th Cir. May 11, 1987). The charges in question are as follows:

> "Let me say that I know how much effort you've put into the case already. I know you put a lot of effort into deliberation and I appreciate the effort you put in.
>
> In this note you request certain items. I cannot give the evidence that you requested. There are legal reasons why I cannot give you the evidence. You must rely on your memories on what the evidence, on what evidence you saw and you heard when you were in court. The fact that certain items cannot by law be given to you you (sic) should not hold against either the state or the defendant in this case.
>
> Since I've told you now that I cannot give you these items I order you to go back to the jury room and to deliberate and arrive at a verdict.

Trial Transcript at 2299.

. . . . . .

> "Ladies and Gentlemen, as I instructed you earlier if the jury is unable to unanimously agree on a recommendation the Court shall impose the sentence of Life Imprisonment without benefit of Probation, Parole, or Suspension of Sentence.
>
> When you enter the jury room it is your duty to consult with one another to consider each other's views and to discuss the evidence with the objective of reaching a just verdict if you can do so without violence to the individual judgment.
>
> Each of you must decide the case for yourself but only after discussion and impartial consideration of the case with your fellow jurors. You are not advocates for one side or the other.Do not hesitate to reexamine your own views and to change your opinion if your are convinced you are wrong but do not surrender your honest belief as to the weight and effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.
>
> Ladies and Gentlemen please retire to the jury room.

Trial Transcript at 2350-51.

Trial judges enjoy wide discretion in determining when to declare a mistrial on grounds of a deadlocked jury. Monroe v. Blackburn, 748 F.2d 958, 961 (5th Cir. 1984).

To amount to a constitutional deprivation, the trial judge's action must constitute coercion that denies the accused a fundamentally fair trial. Bryan v. Wainwright, 511 F.2d 644, 646 (5th Cir. 1975).

The constitutional "Allen charge" simply reminds the jury of the nature of their duty and the time and expense of a trial, and urging them to try again to reach a verdict. Allen v. U.S., 164 U.S. 492 (1896).

In Jenkins v. U.S., 380 U.S. 445 85 S.Ct. 1059 (1965), this Honorable Court held that a trial judge's statement, in response to a jury's note on their inability to reach a verdict, that "you have got to reach a verdict in this case" was coercive." Additionally, the Petitioner relies upon Brasfield v. U.S., 272 U.S. 448, 475 S.Ct. 135 (1926), in which the trial judge's actions were deemed reversable error when he inquired into the jury count and was informed by the foreman that it stood nine to three.

Since the instant case is factually different, the trial judge did not abuse his discretion by asking the jury to further deliberate during the penalty phase. The judge's supplemental jury charge was in careful consideration of Petitioner's rights. The trial judge's questioning into whether further deliberations would be helpful was not an inquiry into the numerical division of the jury. One juror responded negatively while the rest answered affirmatively. This response in no way identified the majority/minority count of the jury or invaded the jury's secrecy.

Furthermore, it must be remembered that this jury was deliberating on five homicides. The record does not reflect the reasons for the jurors' problems in reaching five verdicts.

Therefore, since there is no showing of coercion and the record does not demonstrate coercion sufficient to render the trial fundamentally unfair, this claim is without merit.

ARGUMENT NO. 2

Petitioner argues that the single aggravating circumstance upon which his sentence was based, knowingly creating a risk of death to more than one person, is simply a duplication of the aggravating circumstance the state was required to prove to establish his guilt of first degree murder, specific intent to kill more than one person. [1] Petitioner

[1] La. Rev. Stat. Ann. 14:30(3) provides:
First degree murder is the killing of a human being:
(3) When the offender has specific intent to kill or inflict great bodily harm upon more than one person;
La.C.Cr.P. art 905.4(d) provides:
"The following shall be considered aggravating circumstances:
(d) the offender knowingly created a risk of death or great bodily harm to more than one person:

suggests that this aggravating circumstance fails to narrow the class of persons eligible for the death penalty because it does nothing more than duplicate an element of the crime. This ground is without merit and should, therefore, be denied.

Due to the uniqueness of the death penalty, it cannot be imposed under sentencing procedures that create a substantial risk that it would be inflicted in an arbitrary and capricious manner. Furman v. Georgia, 408 U.S. 238, 256, 92 S.Ct. 2725, 2735 (1972). This problem is corrected when the jury is given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision. Gregg v. Georgia, 428 U.S. 153, 192, 96 S.Ct. 2909, 2934, rehearing denied, 429 U.S. 875, 97 S.Ct. 197 (1976). Capital-sentencing procedures do not violate the Eight and Fourteenth Amendments when they provide for categorical narrowing at the definition stage, and for individualized determination and appellate review at the selection stage. Jurek v. Texas, 428 U.S. 262, 276, 96 S.Ct. 2950, 2958, rehearing denied, 429 U.S. 875, 97 S.Ct. 198 (1976).

In Jurek, supra, this Honorable Court approved as constitutional the Texas capital sentencing system that narrowed the categories of murderers that can be convicted of the underlying crime to those crimes which included well defined aggravating circumstances. The Court limited its approval, however, to a system that allowed the sentencing authority to consider mitigating circumstances. Id. at 267, 96 S.Ct. at 2950. A sentencing procedure with these elements adequately protects against the wanton and freakish imposition of the death penalty. Zant v. Stephens, 462 U.S. 862, 876, 103 S.Ct. 2733, 2742 (1983).

While Petitioner relies upon Collins v. Lockhart, 754 F.2d 258, 264 (8th Cir.), Cert. denied, ____U.S. ____, 106 S.Ct. 546 (1985), which concluded that there is "no escape from the conclusion that an aggravating circumstance which merely repeats an element of the underlying crime cannot perform the narrowing function (required by the Supreme Court)," he fails to address the controlling opinions of this Honorable Court in Zant V. Stephens, 462 U.S. 862, 103 S.Ct. 2733 (1983), and Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, rehearing denied, 429 U.S. 875, 97 S.Ct. 198 (1976). Therefore, Petitioner's reliance on Collins is misplaced.

The Louisiana capital-sentencing scheme provides for categorical narrowing at the definition stage [2] and for individualized determination and appellate review at the selection stage.[3] The narrowing function has been properly achieved in this case by the

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[2] See La. Rev. Stat. Ann. 14:30 (3) (West).
[3] See La. Code of Crim. Proc. arts. 905-905.9 (West).

aggravating circumstance: knowingly creating a risk of death to more than one person. However, finding that circumstance present in the course of determining guilt did not fix punishment. It only served to permissibly advance the sentencing jury to the stage of weighing mitigating as well as aggravating circumstances in order to make an individualized determination of life or death based on the character of the individual and the circumstances of the crime. The Louisiana procedure adequately differentiates this case in an objective, evenhanded, and substantively rational way from the many Louisiana murder cases in which the death penalty may not be imposed. As an additional safeguard, the Supreme Court of the State of Louisiana reviewed the death sentence to determine if it was excessive.

Therefore, by following the dictates of this Honorable Court in Jurek and Zant, the State of Louisiana constitutionally narrowed the class of those homicides subject to the death penalty. It did so by classifying first degree murder as including certain aggravating circumstances, as if it allowed a broader class to be convicted but then limited those within the broader class who could be sentenced to death to only persons whose crimes are accompanied by specific aggravating circumstances. This issue is without merit and should be denied.

ARGUMENT NO. 3

In petitioner's third assignment of error, he claims the trial court erred in denying his motion for substitution of counsel, as well as counsel's motion to withdraw. Both motions were the result of dispute over the proper defense to present at trial. The record indicates that petitioner's counsel, in his judgment, felt the insanity defense as best in this case. Petitioner refused the insanity defense, instead requesting counsel to develope and advance an alibi defense. The trial court properly denied both motions for the foregoing reasons. First removing counsel who was familiar with the case would only result in a disadvantage to petitioner. Mr. Walker had been involved in the case for approximately one year prior to trial. Secondly, the trial court reasoned the that granting of either motion would result in an inordinate delay of the trial as well as incouraging the defendant to employ similar disagreement tactics and seek further delays. The trial judge had no reason to believe petitioner would enjoy a better relationship with a new attorney. Lowenfield v. Phelps, No. 87-3305 U.S.5th Cir. Court of Appeals.

In brief petitioner claims the trial court, in denying his request for substition of counsel, has infringed on his sixth amendment right to effective assistance of counsel. Petitioner's argument rests on the misapplication of the holding in the recent case of

United State v. Cronic, 466 U.S. 650, 104 S.Ct. 2039 (1984). Petitioner attempts to interpret the holding and language used in Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55 (1932), as the holding of this court in the Cronic case. However, Cronic and petitioners case are factually distinguishable from Powell. In Powell, the trial court appointed all the members of the local bar to represent the defendants. This appointment had the result of no representation of the defendants, until a Tennessee lawyer apppeared on their behalf on trial day. This Court held the defendants were denied their sixth Amendment rights to effective assistance of counsel.

Unlike in Powell, counsel in Cronic, as in the case at bar, were adequately prepared for trial. In Cronic, although only given 25 days to prepare, counsel was able to ready himself for the four day jury trial. Cronic at S.Ct. 20, 41, 2045. In Petitioner's case counsel was appointed nearly a year before the case came to trial and had performed all of the investigations and preparations necessary for trial.

It was not until petitioner and counsel disagreed over the proper defense did Petitioner ask for substitute counsel. It is in light of this disagreement that Petitioner would favor the 10th Circuit could holding in the Cronic case. Wherein the appellate court concluded, "that the circumstances surrounding representation of respondent mandated an inference that counsel was unable to discharge his duties." Cronic at S.Ct. 2046. Cronic, simply stated, does not stand for such implications. Moreover, the facts in Petitioners case indicate otherwise:

> "Counsel testified at the habeas hearing that the motion to withdraw resulted primarily from their inability to persuade petitioner to urge an insanity defense. Mr. Capitelli testified that once the decision was made to follow Lowenfield's wishes and rely on the alibi defense, his relationship with Lowenfield was good." Lowenfield v. Phelps, No. 87-3305 U.S. 5th Cir. Court of Appeals.

Therefore, Petitioner is incorrect in assuming that a disagreement over strategy, between himself and counsel, leads to a presumption of ineffectiveness and, thereby, requires a trial court to substitute new counsel.

Next Petitioner claims there was a "conflict of interest" because of the disagreement over trial strategy. Petitioner erroneously asserts that Government of Virgin Islands v. Zepp, 746 F. 2d 125 (3re Cir. 1984), applies to the facts here. In Zepp, trial counsel was subject to an indictment for similar charges pending against his client. There the Third Circuit found that the potential for a conflict was enough to envoke Sixth Amendment protection. However, in Petitioner's case no conflict, nor potential conflict, existed. As stated above and as counsel testified at the district court habeas hearing, once counsel and petitioner agreed on the defense to present at trial their relationship with Lowenfield was good. The state submits that Zepp is both factually and

legally distingushable from Petitioner's case. Finally, the state would respectfully urge this Honorable Court to follow its well reasoned opinion in Morris v. Slappy, 461 U.S. 1, 103 S.Ct. 1610, 1615.

> The Court of Appeals' conclusion that the Sixth Amendment right to counsel "would be without substance if it did not include the right to a meaningful attorney-client relationship," 649 F.2d, at 720 (emphasis added), is without basis in the law. No authority was cited for this novel ingredient of the Sixth Amendment guarantee of counsel, and of course none could be. No court could possible guarantee that a defendant will develope the kind of rapport with his attorney-privately retained or provided by the public-that the Court of appeals thought part of the Sixth Amendment guarantee of counsel.

Here, as in Slappy, although there were disagreements between petitioner anc counsel and a meaning full relationship may not have existed prior to trial, Petitioner was well representated. During the handling of Petitioner's motion for substition the trial court found,

> "the charges against Mr. Walker were unfounded and the trial court knew Mr. Walker to be one of the finest criminal attorneys in Jefferson Parish." State v. Lowenfield, 450 So.2d 675, at 676.

The court did not abuse its discretion in denying the substitution motion. It is the state's position that petitioner's claim in this argument is without merit.

ARGUMENT NO. 4

Petitioner complains here that he was denied effective assistance of counsel due to the failure of trial counsel to investigate and present certain mitigating evidence to the sentencing jury: petitioner's mental impairment.

The guidelines for finding ineffective assistance of counsel were established in Strickland v.Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): "First the defendant must show that counsel's performance was deficient. This requires showing that counsel made error so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense." Id. at 687, 104 S.Ct. at 2064. The Court further explained that: "(S)trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgements support the limitations on investigation. In other words, counsel has a duty to make reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to

counsel's judgments." Id. at 691, 104 S.Ct. at 2066. With these principles in mind, we examine the particular claims of petitioner.

The United States Court of Appeal, Fifth Circuit in its opinion, Lowenfield v. Phelps, ____F.2d____, Slip opinion May 11, 1987, thoroughly analysed this argument as reproduced below:

> Before the sentencing hearing began, Lowenfield and his attorneys discussed whether they should adduce psychiatric testimony. Lowenfield was strongly opposed to it [2] and ultimately persuaded counsel that for tactical reasons this decision was sound. Counsel, at the federal habeas hearing, explained that he believed that the jury had doubts about Lowenfield's guilt that had been difficult for them to resolve. He and Lowenfield concluded that the presentation of psychiatric testimony would telegraph an admission to the jury that Lowenfield had committed the crime and remove any remaining doubts by the jurors of Lowenfield's guilt; they thought that preserving this possible doubt of guilt was more likely to benefit petitioner than psychiatric testimony. Counsel concluded that:
>
> (the presentation of) psychiatric (evidence) would in effect possibly be more detrimental than helpful because what would have happened would be that we'd have the one psychiatrist concerning his possibility of being insane at the time of the crime and they have three or four psychiatrists saying he was sane at the time of the crime and at that point any jurors that may have been misgiven about his guilt would no longer have those misgivings. He (Lowenfield) expressed to me he didn't want to go forward with that. The more I thought about it , the more I examined it, how long the jury was out, I agreed with that.
>
> Habeas hearing record p. 103.
>
> Lowenfield's mental condition was explored as fully as possible by counsel, given petitioner's lack of cooperation. Counsel and the petitioner considered whether the psychiatrists' testimony would undermine the apparent doubt some of the jurors had of petitioner's guilty. They consciously decided that preserving the doubt of guilt would server them better. Considering the deference we must give strategic trial decisions under Strickland, the failure of counsel to call a psychiatrist was not deficient performance. Id. at 689, 104 S.Ct. at 2065-66.
>
> The only other specific complaint of substance about counsel's performance at the sentencing phase of the trial was his failure to call petitioner's relatives to testify on his behalf. The district court credited counsel's testimony that the petitioner did not wish his relatives to be present at the trial and that in any event the family members were unwilling to come to Louisiana to testify. Both of these findings are supported by evidence presented at the habeas hearing. See Habeas record at p. 111.
>
> Wilson v. Butler, 813 F.2d 664 (5th Cir. 1987), relied upon by petitioner, is easily distinguished. In Wilson, counsel did not secure a psychiatric evaluation of his client despite signals that he was suffering from mental defects. Petitioner attached a psychiatric report to his habeas petition that supported his contention of mental defect. No other psychological evidence was in the record. Because the district court conducted no hearing, we held that the record did not "contain sufficient evidence from which the district court could determine whether Simmons (counsel) made a considered strategic decision or

[2] Immediately before the sentencing hearing began, Lowenfield, outside the presence of the jury, told the court that he opposed the presentation of psychiatric testimony in this phase of the trial. Transcript at 2306.

whether this decision was reasonable." Id. at 672. We remanded for an evidentiary hearing on the question of whether counsel's performance was effective including whether the decision not to produce psychiatric evidence at the sentencing hearing was considered strategic decision.

In this case the district court conducted a full evidentiary hearing. In contrast to counsel in Wilson, Lowenfield's attorneys fully explained petitioner's mental condition; counsel provoked three separate sanity hearings in which a total of four psychiatrists testified after examining Lowenfield. Counsel was present when each of the psychiatrist interviewed petitioner.

Counsel consulted with psychiatrist, Dr. Richard Richaux, who agreed to testify if Lowenfield agreed to permit it. Counsel consulted with Lowenfield about the desireability of presenting psychiatric testimony at the sentencing hearing and both petitioner and counsel decided against it for strategic reasons which counsel articulated in the hearing.

The record fully supports the district court's conclusion that counsel's representation of petitioner at the sentencing hearing was adequate.

ARGUMENT NO. 5

In this argument, defendant complains that the Louisiana statute, La. R.S. 15:432, which presumes the sanity of the defendant, is violative of Due Process because it unconstitutionally places the burden of establishing incompetancy on the defendant. In the Louisiana scheme:

> "The defendant carries the burden of establishing that he lacks the capacity to understand the object, nature and consequences of the proceedings against him, and that he is unable, in a rational and factual manner, to consult with counsel in a meaningful way, and to assist in his defense. State v. Hamilton, 373 So.2d 179, (La. 1979); State v. Weber, 364 So.2d 952 (La. 1975).

State v. Narcisse, 426 So.2d 118, 128 (La. 1983). A contradictory hearing is required by La. C.Cr.P. art 647 at which time the defendant has the burden of proving by a preponderance of the evidence that he lacks the mental capacity to proceed, State v. Roy, 395 So.2d 664 (La. 1981). The various criteria that should be considered in evaluating defendant's capacity to stand trial were articulated by the Louisiana Supreme Court in State v. Bennett, 345 So.2d 1129, 1138 (La. 1977). Hence, Louisiana provides safeguards to ensure that a defendant without the capacity to understand the proceedings against him or to assist counsel in preparing a defense will not be subject to trial. La. C.Cr.P. art. 641; State v. Holmes, 393 So.2d 670 (La. 1981); Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975).

Due Process traditonally has required that only the most basic procedural safeguards be observed. The United States Supreme Court in Patterson v. New York, 432 U.S. 197, 975 S.Ct. 2319, 53 L.Ed.2d 281 (1977), said:

"Proof of the nonexistence of all affirmative defenses has never been constitutionally required; and we perceive no reason to fashion such a rule in this case and apply it to the statutory defense at issue here."

The Court further stated that the states may not go beyond constitutional limits so as to label as affirmative defenses some elements of the crimes defined by statutes. In the instant case, the issue of defendant's competence to stand trial is not an element of the crime of first degree murder, but by an affirmative defense which affected whether or not defendant could even go to trial. Since Louisiana provides procedural safeguards to ensure defendant's competency there is no constitutional violation of Due Process.

Although the Supreme Court has never squarely addressed the issue of the burden of proof for competency to stand trial, the Court has addressed the burden of proof for an insanity defense. In Leland v. Oregon, 343 U.S. 790 (1952), the court found that an Oregon statute requiring the defendant to prove insanity beyond a reasonable doubt presented no constitutional infirmity. The Court reasoned that although a plea of insanity was made, the prosecution still was required to prove beyond a reasonable doubt every element of the crime. The Court subsequently confirmed that it is constitutional to burden the defendant with proving his insanity defense in Mullaney v. Wilbur, 421 U.S. 684 (1975). But, later in Patterson v. New York, supra, the Court emphasized that the scheme cannot shift the burden to disprove an essential element of the crime to defendant.

Recently, in two different United States Courts of Appeal opinions, the 1984 Insanity Defense Reform Act's requirement that defendant prove insanity by clear and convincing evidence was held not to violate the Fifth Amendment's Due Process Clause. U. S. v. Amos, 803 F.2d 419, (8th Cir. 1986); U.S. v. Freeman, 804 F.2d 1574, (11th Cir. 1986). Although the issue in the instant case is defendant's competency to stand trial, the analysis is the same. Louisiana offered the defendant procedural methods that safeguarded his rights while his competency to stand trial was determined. The evidence adduced at such hearings does not substitute for evidence needed by the prosecutor to prove beyond a reasonable doubt each element of the crime as defined by the legislature. In the present case the prosecutor still was required to prove beyond a reasonable doubt each element of La. R.S. 14:30, First Degree Murder.

Thus, petitioner's argument herein fails to establish a constitutional violation.

CONCLUSION

Considering the foregoing law and argument Petioner's writ should be denied and a stay of the execution previously set not be issued.

Respectfully submitted,

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24TH JUDICIAL DISTRICT
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NEW COURTHOUSE ANNEX
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CERTIFICATE

I, **Dorothy A. Pendergast**, a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 10th day of June, 1987, I served three copies of the brief in opposition on each of the parties thereto, as follows:

1. On petitioner, Leslie Lowenfield, through his counsel of record, Gary S. Guzy, **KAYE SCHOLER, FIERMAN, HAYS AND HANDLER, 1575 Eye Street, N.W., Washington, D.C., 20005.**

IT IS FURTHER certified that Maurice N. Ross, Jonathan Horn, and Nancy Marshall have been served this 10th day of June, 1987.

DOROTHY A. PENDERGAST